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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

July 20, 1995

*Via Hand Delivery*

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: MM Docket No. 93-136
Application For Review

Dear Mr. Caton:

WSUV, Inc., GGG Broadcasting, Inc. and Palm Beach Radio Broadcasting, Inc., by their respective attorneys, hereby file an original and four copies of their Application for Review in the above-referenced proceeding.

Please direct any questions concerning this matter to the undersigned.

Sincerely yours,

David G. O'Neil

David G. O'Neil

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Enclosures (5)

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Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554

In the Matter of

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|---|---|---|
| Amendment of Section 73.202(b) | ) | |
| FM Table of Allotments | ) | MM Docket No. 93-136 |
| Clewiston, Fort Myers Villas, | ) | |
| Indiantown, Jupiter, Key Colony | ) | RM-8161, RM-8309, RM-8310 |
| Beach, Key Largo, Marathon and | ) | |
| Naples, Florida | ) | |

**APPLICATION FOR REVIEW**

DOCKET FILE COPY ORIGINAL


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**GGG BROADCASTING, INC.**

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July 20, 1995

**SUMMARY**

The Allocations Branch incorrectly dismissed a Joint Counterproposal filed by Palm Beach Radio Broadcasting, Inc., WSUV, Inc. and GGG Broadcasting, Inc. (collectively, "Joint Counterproponents") proposing wide area service for each proponent seeking such service in MM Docket No. 93-136 to 1,400,000 listeners.

The Allocations Branch incorrectly applied a strict standard of scrutiny to the Joint Counterproposal while judging a competing proposal filed by Spanish Broadcasting System of Florida ("SBSF") under a more lenient standard. Failure on the part of the staff to apply the same standard of review to similarly situated petitions in this proceeding mandates reversal of the staff decision.

The Allocations Branch incorrectly rejected the Joint Counterproposal including a partial reimbursement pledge for one of two stations required to change channels pursuant to the Joint Counterproposal. In so doing, the staff deviated from its usual procedures which permit the submission of reimbursement pledges in supplemental pleadings while the record remained open. The staff incorrectly failed to consider the application as substantially complete and permit the filing of a supplemental reimbursement pledge for the second station.

In addition, the staff incorrectly dismissed the Joint Counterproposal for relying upon reference coordinates for a tower site for WROC that the Commission considered suitable for a tower site for allotment for Punta Rassa, Florida. Moreover, the

Commission failed to consider alternative tower sites in the Punta Rassa area.

The Allocations Branch applied different standards in reviewing the Joint Counterproposal and the SBSF proposal. The staff applied a strict standard of scrutiny to the Joint Counterproposal, permitting the Joint Petitioners no opportunity to correct any alleged deficiencies. However, the staff applied a more lenient standard of scrutiny for the SBSF proposal, permitting SBSF to correct technical deficiencies in supplemental proceedings. Such disparate treatment of two similarly situated petitions in the same proceeding constitutes reversible error.

The Joint Counterproposal provides a universal solution whereby each proponent seeking wide area service will be able to provide such service. It also eliminates Receiver Induced Third Order Intermodulation ("RITOI") interference for FM Radio Broadcast Station WCTH. Most importantly, the Joint Counterproposal serves the public interest by providing expedited service to the public while conserving the resources of the Commission and the parties in this proceeding. Under the Joint Counterproposal, everyone ***wins***.

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Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554

In the Matter of

| | | |
|---|---|---|
| Amendment of Section 73.202(b) FM Table of Allotments Clewiston, Fort Myers Villas, Indiantown, Jupiter, Key Colony Beach, Key Largo, Marathon and Naples, Florida | ) ) ) ) ) ) | MM Docket No. 93-136<br><br>RM-8161, RM-8309, RM-8310 |

**APPLICATION FOR REVIEW**

Palm Beach Radio Broadcasting, Inc. ("Palm Beach"), licensee of WPBZ(FM),[1] Indiantown, Florida; WSUV, Inc. ("WSUV"), licensee of WROC(FM), Fort Myers Villas, Florida; and GGG Broadcasting, Inc. ("GGG Broadcasting"),[2] licensee of WJBW(FM), Jupiter, Florida (collectively, "Joint Petitioners"), pursuant to Section 1.115 of the Commission's Rules and by their respective attorneys, hereby file their Application for Review of the Memorandum, Opinion and Order, DA 95-1250 (Chief, Policy and Rules Division) (released June 14, 1995) ("MO&O") in the above captioned proceeding.[3] The

[1] On June 30, 1995, an assignment of license from Amaturo Group, Ltd. to Palm Beach was consummated for WPBZ (File No. BALH-950223GN). Palm Beach today is filing a Notice of Continued Interest and Intent to Participate as the successor in interest to Amaturo Group.

[2] On January 27, 1995, an assignment of license from Jupiter Broadcasting Corporation to GGG Broadcasting was consummated for WJBW (File No. BAPH-940715GE). GGG Broadcasting will file shortly a Notice of Continued Interest and Intent to Participate as the successor in interest to Jupiter Broadcasting.

[3] Sections 1.115(d) and 1.4(b)(1) authorize the filing of an Application for Review within 30 days of the publication of a summary of a Memorandum, Opinion and Order in the Federal Register.

Allocations Branch applied different standards in processing the Joint Petitioners' Joint Counterproposal and the petition for rule making that is the subject of the instant NPRM. Specifically, the Allocations Branch incorrectly applied an excessively strict processing standard against the Joint Petitioners' Joint Counterproposal and did not take into consideration Joint Petitioners' offer of reimbursement in this proceeding. In addition, the Commission Staff failed to consider alternative tower sites for one of the Joint Counterproposal's proposed allotments. On the other hand, the staff did not apply the same strict standard of review to the petition for rule making, permitting the petitioner numerous opportunities to correct defects in its petition. Hence, the Joint Petitioners urge the Commission to set aside the MO&O and grant the Joint Counterproposal. In support thereof, the following is hereby shown.

## BACKGROUND

1. On June 3, 1993, the Commission issued a Notice of Proposed Rule Making and Order to Show Cause, 8 FCC Rcd 3886 (1993) ("NPRM"),[4] proposing the following channel substitutions:

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The MO&O in this proceeding was published in the Federal Register on June 20, 1995. 60 Fed. Reg. 32,120 (1995). The 30th day following Federal Register publication of the MO&O is July 20, 1995. Thus, this pleading is timely filed.

[4] The Commission issued the NPRM in response to a petition for rule making filed by Spanish Broadcasting System of Florida, Inc. ("SBSF"), licensee of WZMQ(FM), Key Largo, Florida.

| Community | Present Channel | Proposed Channel | Call Sign |
|---|---|---|---|
| Key Largo, FL | 280C2 | 292C2 | WZMQ |
| Marathon, FL | 292A | 288A | WAVK |
| Key Colony Beach, FL | 288C2 | 280C2 | WKKB |

The Joint Petitioners timely filed a Joint Counterproposal in response to the NPRM, proposing the following channel substitutions:

| Community | Present Channel | Proposed Channel | Call Sign |
|---|---|---|---|
| Indiantown, FL | 276C2 | 276C1 | WPBZ |
| Naples, FL | 276C3 | 292C3 | WSGL |
| Fort Myers Villas, FL | 292A | 275C2 | WROC |
| Clewiston, FL | 292A | 258A | WAFC |
| Jupiter, FL | 258A | 292C3 | WJBW |

The Joint Counterproposal provided improved wide area service for three stations. It was also mutually exclusive with SBSF's rule making petition.[5]

2. Although the Joint Counterproposal affirmatively stated the intention of the counterproponents to reimburse the licensee of WAFC for expenses associated with changing channels for WAFC and that the Joint Petitioners would promptly construct their upgraded facilities, if granted, the Joint Counterproposal inadvertently did not include a similar reimbursement statement for the licensee of WSGL.

3. The Joint Petitioners rectified this ministerial error in their Reply Comments, whereby they promised to reimburse the

[5] Specifically, the substitution of Channel 292C3 for WJBW is mutually exclusive with the proposed substitution of Channel 292C2 for WZMQ.

licensees for both WAFC and WSGL for their reasonable and prudent expenses associated with changing channels. The Joint Reply Comments also resolved the mutual exclusivity between their Joint Counterproposal and SBSF's petition by substituting channel 288C2 for Channel 280C2 for WZMQ.[6] The Joint Reply Comments provide a global solution whereby each party seeking an upgrade would receive one.

4. Sterling Communications Corp., licensee of WSGL, and SBSF also filed Reply Comments. Sterling stated that it did not oppose a change in channels for WSGL and concurred with the Joint Petitioners that the failure to include a reimbursement pledge in the Joint Counterproposal probably was an oversight that could be cured in a supplemental pleading. SBSF opposed the Joint Counterproposal, arguing, inter alia, that the proposed reference site for WROC specified a location on Sanibel Island that was part of an environmentally protected area unable to permit construction of a broadcast tower.

5. In their response to SBSF's allegations, the Joint Petitioners argued that the Commission had not concluded definitively that Sanibel Island could not support a tower. In addition, the Joint Petitioners demonstrated that additional reference coordinates for a tower site are available, including the reference coordinates contained in the Commission's records for an

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[6] The Joint Counterproposal also permitted the substitution of Channel 237C2 for Channel 292A and modification of license for WAVK.

FM Station for Punta Rassa, Florida as well as other potential sites in Punta Rassa.

6. On August 16, 1994, the Commission Staff released a Report and Order, 8 FCC Rcd 4051 (Acting Chief, Allocations Branch) (1994), granting SBSF's proposed changes to the FM Table of Allotments while denying the Joint Counterproposal on procedural grounds. The staff determined that because the Joint Counterproposal did not include a reimbursement pledge for WSGL, the Joint Counterproposal was not procedurally correct at the time of filing. Id. at 4051-52. Therefore, the staff dismissed the Joint Counterproposal. Id. at 4052.

7. The Joint Petitioners petitioned the Commission for reconsideration of the decision. The Joint Petitioners argued that the dismissal of the Joint Counterproposal constituted error because the Allocations Branch had not provided proper notice that failure to include a reimbursement statement by the deadline for counterproposals was grounds for dismissing the counterproposal, Commission policy did not require dismissal for failure to include a reimbursement statement by the counterproposal deadline, and the rigid application of such a policy was arbitrary and capricious and disserved the public interest.

8. On June 14, 1995, the Allocations Branch issued the MO&O, denying Joint Petitioners' petition for reconsideration. The staff reaffirmed the Report and Order, concluding that the failure on the part of Joint Petitioners to include a reimbursement pledge for WSGL rendered their Joint Counterproposal procedurally defective

sufficient to warrant dismissal of the Joint Counterproposal. MO&O at 2-3. Recognizing the infirmity of their ruling, the staff attempted to buttress the decision by holding alternatively that a suitable transmitter site for WROC did not exist. Id.

## I. DISMISSAL OF THE JOINT COUNTERPROPOSAL CONSTITUTES ERROR

### A. THE JOINT COUNTERPROPOSAL WAS SUBSTANTIALLY COMPLETE AT THE TIME OF FILING

9. The Allocations Branch incorrectly dismissed the Joint Counterproposal for not including a full reimbursement pledge, because the Joint Counterproposal was substantially complete. Consequently, the Commission must reverse the staff decision and grant the Joint Counterproposal.

10. Counterproposals in rule making proceedings must be technically correct and substantially complete when filed. Fort Bragg, California, 6 FCC Rcd 5817, 5817 n.2 (Assistant Chief, Allocations Branch) (1991). The standard is written in the conjunctive, consisting of two separate elements. The first element requires that counterproposals in rule making proceedings be technically correct. The second element requires that counterproposals be substantially complete. Any reasonable interpretation of the two prong standard makes it abundantly clear that although counterproposals must be technically correct at the time of filing, the counterproposal need only be substantially complete and need not comply with a letter perfect standard. It follows, therefore, that although a counterproposal must be

technically correct at the time of filing, a counterproposal need only comply substantially with the Commission's rules, policies and procedures to be acceptable.

11. Commission precedent supports the application of different standards to the technical and procedural aspects of a counterproposal. Where technical deficiencies are present, the Commission will deny the counterproposal without permitting an opportunity to cure the defect. See, e.g., Fort Bragg, California, 6 FCC Rcd 5817 (Assistant Chief, Allocations Branch) (1991) (counterproposal not placed on Public Notice for failure to provide showing of compliance with mileage separation requirements and request waiver of city grade coverage requirement); Broken Arrow, Oklahoma, 3 FCC Rcd 6507, 6511 n.2 (1988), recon. denied, 4 FCC Rcd 6981 (1989) (counterproposal denied where counterproponent failed to request waiver of city grade coverage requirement). However, where the proposal is substantially complete, the Commission has accepted the proposal and permitted the proponent an opportunity to cure procedural defects. See, e.g., Wewoka, Oklahoma, 9 FCC Rcd 6769, 6769 n.1 (Acting Chief, Allocations Branch) (1994) (petitioners permitted opportunity to cure subscription and verification defect); Woodville, Mississippi, 9 FCC Rcd 5718, 5718 n.1 (Acting Chief, Allocations Branch) (1994) (petitioner failing to include verification and subscription statement in petition permitted to cure defect); Cavalier, North Dakota, 9 FCC Rcd 5713, 5713 (Acting Chief, Allocations Branch) (1994) (petition granted despite failure to include verification and subscription

statement); Neenah-Menasha, Wisconsin, 7 FCC Rcd 4594, 4594 n.5 (Chief, Allocations Branch) (1992) (failure of petitioner to serve copy of pleading on other parties in proceeding through inadvertent oversight acceptable); Clintonville, Wisconsin, 4 FCC Rcd 8462, 8462 (Chief, Allocations Branch) (1989) (petitioner failing to include reimbursement pledge in petition permitted to cure defect).

12. The Joint Counterproposal was substantially complete upon filing and therefore entitled to consideration by the Commission. The Joint Counterproposal included a reimbursement pledge for WAFC but inadvertently did not include a similar pledge for WSGL. The Joint Petitioners filed a reimbursement pledge in their Reply Comments. The licensee for WSGL did not object to the reimbursement pledge and concluded that a pledge could be made in supplemental pleadings. Given the leeway the Commission has permitted parties in other rule making proceedings to cure similar procedural defects, failure to accept the Joint Counterproposal and its supplementary reimbursement pledge was arbitrary and capricious and constituted reversible error. See Clintonville, Wisconsin, supra.

### B. THE ALLOCATIONS BRANCH ERRED IN REFUSING TO ACCEPT A REIMBURSEMENT PLEDGE FILED IN REPLY COMMENTS

13. Assuming, arguendo, that the partial reimbursement pledge contained in the Joint Counterproposal was not substantially complete upon initial filing, the Allocations Branch erred in refusing to accept a reimbursement pledge filed by Joint Petitioners in their Reply Comments. The Allocations Branch

incorrectly relies upon Brookville, Pennsylvania, 3 FCC Rcd 5555 (Deputy Chief, Policy and Rules Division) (1988) for the proposition that proposals failing to include a reimbursement pledge will be rejected as invalid. Such a conclusion is inconsistent with a subsequent Bureau decision expressly permitting parties to file reimbursement pledges after filing their initial proposal. See Clintonville, Wisconsin, 4 FCC Rcd at 8462. In Clintonville, the petitioner failed to provide any reimbursement pledge in his initial proposal yet the Commission authorized the filing of curative pleadings. The Joint Counterproposal, on the other hand, included a partial reimbursement pledge that the Joint Petitioner supplemented in their Reply Comments before the record closed.

14. That the Joint Petitioners are entitled to file a supplementary reimbursement pledge in Reply Comments is also supported sub silentio by Commission precedent. In Mary Esther, Florida, 7 FCC Rcd 1417, 1417 (Chief, Allocations Branch) (1992), the Commission rejected a counterproposal because the "counterproposal and the record" (emphasis added) provided no evidence of a reimbursement pledge by the counterproponent. That the quoted Mary Esther language is written in the conjunctive further demonstrates that the Bureau has overlooked and should no longer follow Brookville.[7]

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[7] The staff's reliance upon Lonoke, Arkansas, 6 FCC Rcd 4861 (Chief, Allocations Branch) (1991) and York, Alabama, 4 FCC Rcd 6923 (Chief, Allocations Branch) (1991) is misplaced. In both cases a petition for rule making proposed upgrades for one station

15. If Brookville is still valid, then the Commission should have rejected the counterproposal in Mary Esther on the sole basis that the counterproponent did not include a reimbursement pledge. The phrase "and the record" in Mary Esther would therefore be superfluous. But the Commission did not base its denial of the counterproposal in Mary Esther solely on the counterproponent's failure to include a reimbursement pledge in the counterproposal. Instead, the Commission held that because the counterproposal failed to include a reimbursement pledge and a similar pledge could not be found on the record, the Commission had no choice but to reject the counterproposal. It logically follows, therefore, that if the counterproponent had filed a reimbursement pledge before the record closed, the Commission would have accepted the counterproposal. The only opportunity for a counterproponent to file "on the record" in a rule making proceeding after filing his counterproposal is during reply comments. Therefore, the Joint Petitioners submit that Mary Esther stands for the proposition that a reimbursement pledge is acceptable whether filed in counterproposals or by the reply comment deadline.

16. The Commission will accept supplemental pleadings when the pleading is submitted for the purpose of correcting an

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and changes in channels for a second station. In the Notices of Proposed Rule Making issued in response to the petitions, the Commission specifically stated that any party filing comments in response to the NPRMs must state their intention to reimburse the station required to change channels. Unlike the Joint Petitioners, the commenters in Lonoke and York failed to make any reimbursement pledge in comments or on the record. Thus, these cases do not support dismissal of the Joint Counterproposal.

inadvertent error. In Caldwell, Texas, DA 95-1433 (Chief Allocations Branch) (released July 5, 1995), the proponent inadvertently failed to include an engineering exhibit in its Reply Comments. The Commission accepted a late filed engineering exhibit after the record closed, concluding that the engineering exhibit related to an issue raised by petitioner in timely Comments and Reply Comments. Id. at 2 n.7. As further justification for accepting the exhibit, the Commission noted that acceptance of the exhibit would assist the Commission in fully considering the engineering issue discussed in the exhibit and would not delay resolution of the proceeding. Id.[8] The Joint Petitioners Counterproposal was more complete than the submission in Caldwell, Texas. Moreover, unlike the proponent in Caldwell, Texas, the Joint Petitioner corrected its inadvertent error before the record closed.

17. The Joint Petitioners fully complied with the standard established in Mary Esther and Clintonville. Indeed, unlike the counterproponent in Mary Esther and analogous to the proponent in Caldwell, Texas, the Joint Petitioners actually included a partial reimbursement pledge in the Joint Counterproposal. When the Joint Petitioners realized they had inadvertently excluded a second

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[8] Caldwell, Texas supports acceptance of the Joint Counterproposal. Acceptance of the Joint Counterproposal and the supplemental reimbursement pledge in this proceeding permits the Commission to fully consider the Joint Counterproposal. Moreover, the submission of the supplemental reimbursement pledge, filed during the pleading cycle and while the record was open, would not delay resolution of this proceeding.

reimbursement pledge in the Joint Counterproposal, they filed that further reimbursement pledge in their Reply Comments. Thus, the Commission's failure to consider Joint Petitioner's reimbursement pledge made in Reply Comments contradicts established Commission precedent and should be reversed.

### C. THE COMMISSION'S FAILURE TO CONSIDER JOINT PETITIONERS' REIMBURSEMENT PLEDGE MADE IN REPLY COMMENTS IS ARBITRARY AND CAPRICIOUS

18. The Commission repeatedly has permitted petitioners in rule making proceedings to correct procedural defects during the pleading cycle of the rule making proceeding. See, e.g., Wewoka, Oklahoma, 9 FCC Rcd at 6769 n.1; Woodville, Mississippi, 9 FCC Rcd at 5718 n.1; Cavalier, North Dakota, 9 FCC Rcd at 5713; Neenah-Menasha, Wisconsin, 7 FCC Rcd at 4594 n.5; Clintonville, Wisconsin, 4 FCC Rcd at 8462. Yet the Commission has refused to permit the Joint Petitioners in this proceeding to cure a similar defect. Because both petitioners and counterproponents are proposing changes in the FM Table of Allotments for the first time in the same rule making proceeding, the Commission must apply the same standards in processing the two types of petitions. Failure to do so constitutes arbitrary and capricious behavior.

19. However, in the instant case, the Commission applied different standards regarding reimbursement pledges for parties in rule making proceedings. In Clintonville, Wisconsin, the Commission permitted the petitioner who failed to include a reimbursement pledge to submit the pledge in a subsequent pleading,

instead of dismissing the petition. Clintonville, 4 FCC Rcd at 8462. However, in this proceeding, the Commission rejected Joint Petitioners' Joint Counterproposal because it included only a partial reimbursement pledge. No opportunity was provided for Joint Petitioners to cure the alleged defect in a subsequent pleading, as was provided the petitioner in Clintonville. The Commission must reverse the Allocation Branch's action as arbitrary and capricious.[9]

## II. THE COMMISSION STAFF INCORRECTLY DETERMINED THAT A SUITABLE TOWER SITE FOR WROC(FM) DID NOT EXIST

### A. THE JOINT COUNTERPROPOSAL PROPERLY RELIED UPON THE COMMISSION'S DATABASE IN SELECTING A TOWER SITE

20. The MO&O incorrectly rejected the reference coordinates for the proposed transmitter site for WROC as unsuitable when the Commission approved the exact same coordinates as suitable for another allotment. Such disparate treatment in two separate rule making proceedings constitutes clear error and must be reversed.

21. The Joint Counterproposal originally proposed a tower site for WROC on Sanibel Island, which SBSF challenged as

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[9] As discussed in Section IV, infra, the Allocations Branch also applied different processing standards in this rule making proceeding between the Joint Petitioners and SBSF. SBSF's petition was not technically correct at the time of filing for failing to specify the alleged RITOI problem. Instead of rejecting the petition, the Commission permitted SBSF to cure the defective petition through a subsequent pleading. The Commission either should have dismissed SBSF's petition or provided the Joint Petitioners with an opportunity to cure the alleged defect in their petition.

unsuitable due to environmental concerns. Although not conceding the unsuitability of Sanibel Island for a tower site, the Joint Petitioners responded to SBSF's allegations by noting that several other reference coordinates for a tower site for WROC were available, including the reference coordinates contained in the Commission's FM Table of Allotments for Punta Rassa, Florida as well as potential tower sites within the community of Punta Rassa.

22. In rejecting the Punta Rassa reference coordinates as a suitable tower site because the reference coordinates specified a location offshore, the Allocations Branch adopted a different standard for the Joint Petitioners than for the proponent for the Punta Rassa allotment. The Commission itself previously concluded that the reference coordinates specified for WROC are a suitable location for a proposed tower site for an allotment at Punta Rassa, Florida. Joint Petitioners had no reason to expect that the Commission would adopt reference coordinates for an FM allotment that were unsuitable for a tower site. For the Allocations Branch to hold in this proceeding that Commission approved reference coordinates suitable for a tower site at Punta Rassa are unsuitable for WROC constitutes arbitrary and capricious treatment, which must be reversed. See Melody Music, 345 F.2d 730 (D.C. Cir. 1965). Either the Commission must withdraw the Punta Rassa allotment for specifying an unsuitable tower site, accept the Joint Petitioners' reliance upon the same reference coordinates for WROC, or as the Joint Petitioners will now show, permit the consideration of alternative tower sites for WROC.

B. THE COMMISSION FAILED TO CONSIDER ALTERNATIVE TOWER SITES FOR WROC

23. As an alternative to withdrawing the Punta Rassa allotment or permitting the Joint Petitioners to rely upon those reference coordinates for WROC, the Allocations Branch should have considered alternative tower sites for WROC. Joint Petitioners provided the Allocations Branch with several possible locations for a tower site for WROC in Punta Rassa, Florida, but the MO&O failed to consider these alternative tower sites for WROC, instead concluding that the nearest point to the reference coordinates for Punta Rassa consisted of a public park which was unsuitable for a tower site. The MO&O improperly failed to consider other suitable tower sites for WROC within the community of Punta Rassa and that failure constitutes reversible error.

24. That alternative tower sites are available is evident by the number of towers currently located in Punta Rassa, Florida. Punta Rassa consists of several high rise buildings with antennas located on top, a marina, and other office buildings. That Punta Rassa is a community capable of supporting a tower site is evident by the fact that the Commission concluded that Punta Rassa was a community for allotment purposes. If Punta Rassa was a "swamp," as SBSF maintains, then the Commission would never have allotted the community a channel. It is incumbent upon the Commission to consider alternative tower sites for WROC in Punta Rassa or the surrounding environs, especially in view of the Joint Petitioners' proper reliance upon the Commission's own reference coordinates for Punta Rassa for a proposed tower site.

25. SBSF has not provided probative evidence that a tower site in Punta Rassa is unsuitable for environmental or zoning reasons. SBSF's entire evidence consists of a hearsay declaration of one of its technical consultants stating that in the opinion of local zoning employees, a tower site in Punta Rassa is undesirable. Nowhere does SBSF provide evidence from the Punta Rassa zoning boards or local, state or federal environmental agencies that a tower site in Punta Rassa is unsuitable per se. The Commission presumes that a tower site is suitable unless substantial probative evidence is provided to the contrary. The burden upon the party challenging the suitability of the site is very high. SBSF may overcome this presumption upon a specific determination by a zoning board or government agency that a proposed tower site is unsuitable; blanket declarations by zoning employees are insufficient.[10] Therefore, the Commission should conclude that a

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[10] Sanibel Island, 7 FCC Rcd 850 (1992), upon which both SBSF and the Commission rely in concluding that Sanibel Island is unsuitable for a tower, demonstrates the high burden SBSF must satisfy in persuading the Commission of the unsuitability of a proposed tower site. In Sanibel Island, the petitioner proposed changing communities of license because no suitable tower site existed for constructing an FM station that would provide the required signal over its community of license and satisfy the mileage separation requirements. The petitioner in that case provided detailed affidavits from its principal and engineer as well as decisions and letters from zoning authorities, environmental agencies and other tower owners demonstrating the inability to construct a tower on Sanibel Island. More importantly, the petitioner provided evidence of its inability to construct a tower because of zoning and environmental concerns over a seven year period. SBSF provides no evidence remotely satisfying this high standard to demonstrate unsuitability of a tower site at Punta Rassa, nor does the Commission make any such determination.

suitable tower site for WROC exists under the Joint Counterproposal.

## III. GRANTING SBSF'S PROPOSAL CONSTITUTES ERROR

### A. SBSF FAILED TO SUBMIT SUFFICIENT EVIDENCE CONCERNING INTERMODULATION INTERFERENCE AND WHETHER THE PRESENCE OF ALTERNATIVE SOLUTIONS WARRANTED MODIFYING THE FM TABLE OF ALLOTMENTS

26. SBSF has not provided sufficient technical justification for a change in the FM Table of Allotments for WZMQ. Although SBSF claims that WZMQ has received reports of Receiver Induced Third Order Intermodulation ("RITOI") interference in some automobile receivers within the vicinity of it shared antenna, SBSF has yet to provide any evidence of such interference, the number of times such interference occurs, and the frequency with which such interference occurs. SBSF's entire rule making petition is based on a vague and self-serving statement.

27. Nevertheless, instead of denying SBSF's petition for rule making under the rigid and unyielding "procedurally and technically correct at the time of filing" standard that the Commission Staff applied to the Joint Petitioners in this proceeding, the Commission Staff permitted SBSF to provide "evidence" of such interference in subsequent comments. SBSF submitted no evidence of RITOI, such as mathematical algorithms demonstrating that the combination of frequencies which would be likely to cause intermodulation on the frequency used by WCTH(FM), or measurement test data demonstrating or even suggesting the presence of intermodulation. Most significantly, SBSF did not even supply letters from listeners

detailing the seriousness of the problem or even a statement from SBSF describing the number of occurrences and frequency of interference complaints. Certainly, if RITOI is present to the extent that SBSF claims, evidence of complaints would be forthcoming. SBSF never provided any evidence of complaints. Instead, SBSF simply submitted a statement from its own station engineer vaguely stating that he and a third party engineer conducted some informal tests. Conspicuously no supporting statement was offered from the third party engineer.

28. WCTH, the station allegedly suffering from RITOI, also failed to provide evidence of any complaints. SBSF did submit a letter from WCTH's engineer referring to complaints, but failed to supply evidence such as number, frequency, or extent of interference complaints. The vagueness and brevity of WCTH's letter seriously undermines SBSF's argument of RITOI. Certainly if RITOI occurred to the extent SBSF claims, WCTH would have knowledge of the extent to which RITOI is occurring, including number of complaints, the frequency, and the location of the complaints. In addition, WCTH certainly would have made some effort prior to SBSF filing a rule making proceeding to resolve the RITOI interference.

29. Moreover, SBSF has provided no evidence that WCTH has made any effort to eliminate the RITOI interference prior to this rule making proceeding. Based on the statements submitted in this proceeding, one could reasonably infer that the alleged intermodulation problem is more important to SBSF than to the licensee of the station supposedly receiving such interference.

Clearly the evidence placed into the record is insufficient to warrant amending the FM Table of Allotments, much less the extraordinary remedy of a forced channel change for two other stations. See e.g., University of Minnesota, 25 RR 2d 610 (1972).

30. In addition, the Allocations Branch should have concluded that SBSF's stated goal of remedying RITOI interference, which allegedly occurs in automobiles within close proximity to the shared tower, does not constitute sufficient justification for changing the FM Table of Allotments. The Commission previously has stated that the occurrence of RITOI interference in car radios or portable receivers within close proximity to a broadcast tower is excluded from consideration since these devices are inherently transient in nature.[11]

31. Finally, the Allocations Branch did not take into consideration an alternative solution on the record that would have eliminated or substantially reduced the effects of the alleged RITOI interference without the need for amending the FM Table of Allotments. In its Reply Comments in this proceeding, Vero Beach noted that it is generally acknowledged that RITOI interference may be overcome simply by separating the two stations that are causing the interference. Vero Beach also noted that SBSF was proposing a reference site for its proposed channel that was 20 kilometers from

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[11] See WKLX, Inc., 6 FCC Rcd 225, 227 (1991) (A mobile receiver moving through the potential interference area will encounter constantly varying propagation paths and signal strengths from the pertinent stations, resulting in a continuously varying potential for interference).

its currently licensed facilities. Vero Beach therefore observed that SBSF could simply move its facilities and remain on its existing channel. Such a solution would eliminate any intermodulation and avoid changing channels for WKKB or WAVK. In sum, the Commission should deny SBSF's allotment proposal as not technically "correct" in its RITOI evidence and not substantively persuasive as a basis for amending the FM Table of Allotments.

## IV. THE COMMISSION APPLIED DIFFERENT STANDARDS IN PROCESSING SBSF'S PETITION AND THE JOINT PETITIONERS' JOINT COUNTERPROPOSAL

32. The Allocations Branch applied different standards in ruling on the Joint Petitioners' Joint Counterproposal and SBSF's petition for rule making. The use of different standards for similar petitions in the same rule making proceeding constitutes reversible error.

33. In denying the Joint Counterproposal, the Commission Staff applied a rigid "procedurally and technically correct" standard of review. Based on this standard, the Allocations Branch rejected a reimbursement pledge that inadvertently omitted a similar pledge for a second station. In addition, the Allocations Branch failed to take into consideration alternative tower sites for one of the proposed allotments. The Allocations Branch did not provide the Joint Petitioners with any opportunity to cure any defect.

34. On the other hand, in granting SBSF's petition, the Commission applied a lessor standard than "procedurally and